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SUPREME COURT, U. S.

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-886

BROWNDALE INTERNATIONAL LIMITED,
A Canadian Corporation,
Petitioner,

v.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, Consisting of MILLARD ERICKSON, OSCAR HOLTE and HARLAND DAHLK, and TOWN OF COTTAGE GROVE,
Respondents,

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

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OPINION OF SUPREME COURT OF WISCONSIN

No. 403

August Term, 1972

STATE OF WISCONSIN : IN SUPREME COURT

Browndale International, Ltd.,
a Canadian corp.,
Plaintiff-Respondent,

v.

Board of Adjustment for the
County of Dane, etc.,
Defendant-Appellant,

Town of Cottage Grove,
Intervenor-Appellant,

APPEALS from a judgment of the circuit court for Dane county: GEORGE R. CURRIE, Reserve Circuit Judge. Presiding. *Reversed.*

This is an appeal from a judgment entered on May 15, 1972, in the Dane County Circuit Court in a proceeding of review by certiorari reversing the March 17, 1972 decision of the Dane County Board of Adjustment. The board's decision had modified the Dane county zoning supervisor's determination that the homes proposed by the respondent were single family dwellings within the meaning of the Dane county zoning ordinance. The board stated that the purchase and use by Browndale International, Ltd., of certain single family residences in the town of Cottage Grove for the purpose of housing and caring for emotionally disturbed children do not fall within the meaning of a "single family dwelling" or a "single

family unit" as defined and used in the ordinance.[1] The board concluded that the "use" intended by Browndale requires "site approval" under sec. 10.12 (2) (c) of the ordinance. The circuit court held that such homes are single family dwellings if not more than five children reside therein; and if more than five children reside in such home then site approval is required.

The Board of Adjustment for the County of Dane and the Town of Cottage Grove appeal.

The facts will be set forth in the opinion.

BEILFUSS, J. Dane county, for zoning purposes, is divided into 13 districts. Sec. 10.02 (1), Ordinance. The district in question is an A-1 Agricultural District. Under sec. 10.12 (1) of the ordinance, certain "permitted uses" for an A-1 Agricultural District are enumerated. Site approval is not required. One such "use" is a "single family detached dwelling unit." Under sec. 10.12 (2) of the ordinance other enumerated uses are also permitted but only upon first obtaining site approval.

Sec. 10.01 (18) (a) of the ordinance defines a "single family dwelling" as: "A building designed for and occupied exclusively as a residence for one family." Sec. 10.01 (19) defines "family" as: "Any number of individuals related by blood or marriage, or not to exceed five (5) persons not so related, living together on the premises as a single housekeeping unit, including any domestic servants." The basic issue in this action is whether a Browndale therapeutic home falls within the meaning and definition of a single family dwelling unit. It if does then the homes can be located in the area in question without site approval.

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[1] The supervisor had found that the therapeutic homes did.

The nature of the Browndale therapeutic home and its intended purposes (for the care and maintenance of emotionally disturbed children) first requires an understanding of what Browndale International, Ltd., is, its history and what is its purpose. John L. Brown is the founder and president of this Canadian corporation. Mr. Brown is a psychiatric social worker by profession. He has worked with emotionally disturbed children since 1944. For several years he worked at the Warrendale Institution in Ontario. Over the years the institution changed over to a family model treatment center. In 1966, Mr. Brown started his own privately operated Browndale program. This program branched out into the United States. The program's purpose is to treat the disturbed children in the community. The method centers around the concept of normalizing a child's lifestyle as much like a child who has been living with his own family. It is a therapeutic family concept of care which attempts to duplicate the family life.

Browndale International, Ltd., itself is not the corporation engaged in the direct care and maintenance of these emotionally disturbed children; nor it is licensed by the State of Wisconsin as a child welfare agency. Rather, a state licensed corporation called "Involvement Centers, Wisconsin, Inc.," (hereinafter Involvement Center or Center) provides the care and operates these homes. The Involvement Center is licensed under sec. 48.60, Stats., as a child welfare agency. The places of care provided for the children are referred to by the Department of Health and Social Services as "child welfare institutions" under its rules and regulations. The Involvement Center is a subsidiary or an affiliated corporation of Browndale International, Ltd.[2]/ The Involvement

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2/ Browndale International, Ltd., will be referred to as "Browndale."

Center was incorporated in December of 1971 and consists of 15 stockholders, to wit: Browndale, Mr. Brown and his wife, two people from Arizona and Minnesota, two people from Ontario, and the senior staff of the Wisconsin operation.

The property in question consists of two adajcent pieces of land of about 182 acres located in an A-1 agricultural district in the town of Cottage Grove. This property is what precipitated the appeal. Browndale had contracted to purchase six homes located on this property. Of the six homes, one is already licensed and a permit was granted as of January of 1972. The reason Browndale contracted to purchase this property was so it could lease residences for profit to the Involvement Center. The Center intends to use the property for the purpose of establishing homes for "therapeutic families." It should be noted that Browndale is eventually planning to have 21 homes for 105 children in this state. There are already six homes in Dane county and another five homes are planned for the town of Cottage Grove. The number of children in each home varies from eight in the town of Fitchburg to four in the only home licensed and permitted in Cottage Grove. By contractual agreement, Browndale provides the facilities and furnishings for these buildings the Center leases. The rent per month depends on how many children are in each home unit. The amount varies from not less than $400 to not more than $1,000 per month. The lease provides that the Center pay all real estate taxes. The Center's source of income is a $37 fee for each child taken care of per day. The fee is paid by the county and the state. The one therapeutic home in Cottage Grove that is in "use" is not presently owned by Browndale. Rather, Browndale is renting the home from one Mr. Moe for $250 per month. Browndale then subleases it to the Center for $400 per month rent.

The initial operation for these therapeutic homes in Dane county began in September of 1971. The average stay for a child is fifteen months. The projected gross revenue for 1972 in Dane county (based on a planned 105 children in 21 homes) was somewhere between one to 1.3 million dollars. Mr. Brown testified that the net profit budgeted for the Browndale operation is estimated at three to six percent. But the record shows that the actual profit factor for 1972 turned out to be eight to 10 percent.

The emotionally disturbed children who are housed in these homes are either neglected, dependent or delinquent. The children are involuntarily placed in these homes by the juvenile court. The purpose is for treatment and rehabilitation. However, once the child is placed there he is not forced to remain. The child, if he desires, can be relocated elsewhere. The four children presently at the Cottage Grove home ". . . are the 1% of the most disturbed children in the State."[3/] The children need intensive and extensive care and treatment, and are under strict supervision. If they are able to, they attend area schools.

Each therapeutic home is staffed with the following personnel: Therapeutic parents who supervise the children and the program. They function as surrogates and are responsible for the child 24 hours a day. They do not live there. There are no set hours of work; rather, the hours put in depend upon the pattern of life-style they create for each home. Most importantly, the therapeutic parents are not supposed to identify to these children as their parents, nor act as

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[3/] Mr. Brown testified that for some of these emotionally disturbed children it takes time before they become civilized. He added. ". . . You are trying to civilize them and teach them how to live in the community. . . ." Some children are very disturbed, difficult and suffer physical ailments.

substitutes for the biological parents, nor provide the children with a mother-father image. Mr. Brown's testimony is descriptive of their role:

> "Q. Do the children identify with the therapeutic parents? In other words, do they refer to them as a father image?
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> "A. No, we don't use that because we have to remember that while we treat the child as though he were our own, because that is what he needs, he is not our own and we can't get back from him — he belongs to somebody else. He is somebody else's child, and so part of our work is to include the biological family as well. Now this is hard for most people to understand because we have been used to the idea that if their own family couldn't take care of a child, you gave the kid to somebody else to take care of and he was theirs. We don't operate that way. We say we will give the child what he needs without claiming him. Who should claim him are his biological kin.
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> "THE COURT: How do these children refer to the therapeutic parents? What do they call them?
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> "THE WITNESS: At the best times, John or Mary or Joe — at the worst times, profanities unmentionable, but they usually call them by their first name or nickname. There are times when a child will feel very, very close to a person and very, very tender and then he might refer to mom or dad, but we don't encourage it because what we are trying to do is not to provide a substitute for the child, we are trying to provide an experience, a human experience, so that he can go back and live with his own and so we contact his family and we work with his family in such a way that the child sees them as the parents."

In addition to the therapeutic parents, other staff members are employed to assist them. An individual is hired to cook and clean, and another to supervise the children at night.

A social worker and a nurse are assigned to the house. The nurse is the only part-time employee. The social worker and nurse may work at one or more houses depending upon the problems and experiences encountered with such houses.

The salaries of the personnel for the Cottage Grove home are paid in part by both Browndale and the Center. A weekly allowance is also given to the Cottage Grove home in the amount of $4 per child per day. This money is used for food, clothing and miscellaneous household expenses such as Kleenex, non-grocery items, etc. The two therapeutic parents receive a minimum of $125 each per week, plus all health and medical group insurance and 40 days of vacation each year. The night supervisor and the individual who cooks and cleans receives $1.60 per hour, and works from 36 to 48 hours per week. The nurse receives $225 to $250 per month. The social worker receives $10,000 per year. An extra staff is hired to handle any potential crisis at the home or to substitute for a staff member. This "extra staff" receives $135 per week. A medical doctor and psychiatrist are on call and receive $20 to $30 per hour when needed. The general personnel for Browndale and the Center are: (1) A program developer who sets up these homes and receives $10,000 per year; (2) an assistant-director who is available for training and teaching and who receives $12,000 per year; (3) a staff supervisor who receives $130 to $135 per week; and (4) an assistant-director who receives $15,000 per year. Mr. Brown does not receive a salary but he derives his income from the stock investments in Browndale and the Center.

Neither Browndale nor the Center are licensed as foster homes, and only the Center is licensed as a child welfare agency. Mr. Brown testified that prior to January of 1972 the therapeutic family was treated by the state as a foster home,[4]/ while the city of Madison treated the three homes located there as boarding houses. Site approval was not needed. The homes were run by licensed foster parents who rented from Browndale. Shortly thereafter the city of Madison changed its definition of "uses" under its ordinance. Site approval was then needed. The state also decided that the Centers should be licensed as child welfare agencies since they provided care and maintenance for more than four children.[5]/ There were several reasons stated why that licensing category was made. The Involvement Center planned to provide care and maintenance for 105 emotionally disturbed children in 21 homes in Dane county; five home facilities were already in existence by January of 1972. The state determined that sec. 48.60, Stats., compelled the Center to be licensed as a child welfare agency. Browndale agreed to this because then it could receive a federal grant which was not available to licensed foster homes. The Involvement Center, licensed as a child welfare agency, gave the Center its own autonomy.

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[4]/ Under ch. 48, Stats., there are three categories of licensing classifications, to wit: (1) Foster homes, sec. 48.62; (2) child welfare agencies, sec. 48.60; and (3) day care centers, sec. 48.65. These are all under the authority of the Department of Health and Social Services.

[5]/ Sec. 48.60 (1) and (2) (e), Stats., provides: "*Child welfare agencies licensed.* (1) No person shall receive children with or without transfer of legal custory, to provide care and maintenance for 75 days in any consecutive 12 months' period for 4 or more such children at any one time unless he obtains a license to operate a child welfare agency from the department.

"(2) This section does not include: . . . (e) A licensed foster home."

Sec. 48.62 (1), Stats., provides: "*Foster homes licensed.* (1) No person shall receive, with or without transfer of legal custody, any child to provide care and maintenance for that child unless he obtains a license to operate a foster home from the department or from a county agency or licensed child welfare agency as provided in s. 48.75."

The Center would be able to control its own intake and resources for hiring personnel, purchasing facilities and for the care and treatment of the children. In contrast, if licensed as a foster home the Browndale therapeutic homes would remain under the direct and exclusive supervision, control and responsibility of the department. The foster children must then reside with the foster parents in the latters' home. Also, in foster homes the foster parents must be licensed, the parents must live at the home, and such parents must provide specified care in a specified location for a specified period of time under specified conditions. Further, one cannot substitute for a foster parent without the department's expressed permission.

Finally, the record substantiates the fact that Browndale homes have continued to operate the same way before and after its child welfare classification. The therapeutic homes do not operate like or on a large scale institutionalized level such as Mendota State Hospital.

The first issue is whether the circuit court exceeded its jurisdictional scope of review by certiorari.

Both the appellant and the intervenor-appellant contend that sec. 59.99 (10) through (13), Stats., limits the court's review by certiorari. They argue that the circuit court could not go beyond the record, nor can it consider the matter *de novo*. It is argued that the court's review was limited only to the question of whether the board was within its jurisdiction and not based upon an error of law.

Sec. 59.99 (1) through (13), Stats., provides:

> "(10) *Court Review*. Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department,

board or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of illegality. Such petition shall be presented to the court within thirty days after the filing of the decision in the office of the board.

"(11) *Certiorari.* Upon the presentation of such petition the court may allow a writ of certiorari directed to the board of adjustment to review such decision of the board of adjustment, and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

"(12) *Return to Writ.* The board of adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

"(13) *Court Decision.* If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review."

We believe the appellant and the intervenor-appellant miscontrue sec. 59.99, Stats. The statute is explicit on its

face. The court, in its discretion, can take additional testimony and other evidence and make findings of fact and conclusions of law. The court then may ". . . reverse or affirm, wholly or partly, or may modify the decision brought up for review." This is exactly what was done in the case under sub. (13). The court did not exceed its scope of review. The statute allows the court to take additional evidence and make additional findings of fact and conclusions of law.

Notwithstanding this statutory pronouncement, the appellants argue that what the statute says is not what it really means. For support they point to this court's decisions in *State ex rel. Morehouse v. Hunt* (1940), 235 Wis. 358, 291 N.W. 745, and *State ex rel. Conn v. Board of Trustees* (1969), 44 Wis. 2d 479, 171 N.W. 2d 418. In *Hunt* the court stated at page 367:

> "The case is *certiorari.* When *certiorari* is invoked to review the action of an administrative board, the findings of the board upon the facts before it are conclusive if in any reasonable view the evidence sustains them. *Wisconsin Labor R. Board v. Fred Rueping L. Co.* 228 Wis. 473, 493, 279 N.W. 673. Under this rule the appeal board's view of the facts, so far as they appear from its decision, must be accepted as final and conclusive upon the trial court and upon us. The statutory provision for review by *certiorari* of the board's action, to the effect that the court may take further evidence and may consider it in reaching its determination, may warrant the court's overriding the board's findings of fact if the additional evidence received shows them to be erroneous, but where as here the additional evidence is incompetent it cannot be given that effect however it might be if it were competent. . . ."

In *State ex rel. Conn, supra,* the court stated at page 482:

> "(2) Where statutory remedies are provided, the procedure prescribed by the statute must be strictly pursued. (Citing *Essock v. Cold Spring* (1960), 10 Wis. 2d 98, 102 N.W. 2d 110.)
>
> "(3) In a certiorari case the court is not allowed to consider matters outside the record. (Citing *State ex rel. Kaczkowski v. Fire & Police Comm.* (1967), 33 Wis. 2d 488, 148 N.W. 2d 44, 149 N.W. 2d 547, and other cases.)
>
> "(4) Before a court will grant the writ, it must appear that (a) there has been some error committed; (b) the error has caused substantial harm; and (c) the plaintiff has not been guilty of laches in seeking his remedy. (Citing *State ex rel. Damerow v. Behrens* (1960), 11 Wis. 2d 426, 105 N.W. 2d 866; *Consolidated Apparel Co. v. Common Council* (1961), 14 Wis. 2d 31, 109 N.W. 2d 486.)"

Contrary to appellants' position, both cases are clearly distinguishable and have no application to the scope of review by statutory certiorari. The *Hunt* decision was based on the interpretation of ch. 62 on Cities, sec. 62.23 (8) (b) and (i), Stats. 1939. Sec. 62.23 (8) (i)[6] only states that the court shall make a determination but to ". . . reverse or affirm, wholly or partly or . . . modify the decision brought up for review." *Hunt* dealt with a review from a decision by the board of appeals established by the city council. In this case the review is from the Board of Adjustment which is a distinct and separate statutory entity. *Hunt* dealt with an interpretation of

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[6] Sec. 62.23 (8) (i), Stats. 1939, provided: "Said court may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. Costs shall not be allowed against the board, unless it shall appear to the court that it acted with gross negligence or in bad faith."

a different statutory scope of review; the *Hunt* decision itself recognized the court can override the board's findings of fact if additional evidence shows the board's findings to be erroneous.

State ex rel. Conn, supra, also is not applicable. In that case, review by certiorari did not allow the court to consider matters outside the record. In this case the court can go outside the record to take additional evidence to make findings of fact and conclusions of law. Sec. 59.99 (13), Stats. *State ex rel. Conn, supra,* was decided on the basis of laches. This is not an issue here.

The appellants argue that this has somehow all been changed by this court's decision in *Buhler v. Racine County* (1966), 33 Wis. 2d 137, 146 N.W. 2d 403, when review by certiorari is sought from a decision by any zoning authorities. This court in *Buhler* stated, at pages 146, 147:

> "We do not hold the trial court was without jurisdiction to hear this case. We have held, and other jurisdictions have generally held, courts have power to grant relief against zoning when it is unconstitutional, unreasonable or discriminatory. Courts can determine whether a zoning ordinance is a valid exercise of the police power, is within the limits of public necessity, and bears a substantial relationship to public purposes of health, safety or welfare. In some cases courts have reviewed zoning classifications to determine whether a classification of uses was fair and reasonable or arbitrary. *Smith v. Brookfield* (1956), 272 Wis. 1, 74 N.W. (2d) 770. In other cases, courts have inquired into the scheme of classification to see if it is applied fairly and impartially in a given case. *State ex rel. Humble Oil & Refining Co. v. Wahner* (1964), 25 Wis. (2d) 1, 130 N.W. (2d) 304; *Geisenfeld v. Shorewood* (1939), 232 Wis. 410, 287 N.W. 683; *Rowland v. Racine* (1937), 223 Wis. 488, 271 N.W. 36; *State ex rel.*

Tingley v. Gurda (1932), 209 Wis. 63, 243 N.W. 317; 8A McQuillin, Mun. Corp. (3d ed., 1965 rev.), p. 263, sec. 25.277.

"However, since zoning is a legislative function, judicial review is limited and judicial interference restricted to cases of abuse of discretion, excess of power, or error of law. Consequently, although a court may differ with the wisdom, or lack thereof, or the desirability of the zoning, the court, because of the fundamental nature of its power, cannot substitute its judgment for that of the zoning authority in the absence of statutory authorization. This rule applies not only to the necessity and extent of zoning but also to rezoning, classification, establishment of districts, boundaries, uses, and to the determination of whether or not there has been such a change of conditions as to warrant rezoning. . . ."

Two factors distinguish this case. The *Buhler* decision did not deal with the issue of the "scope of review by statutory certiorari." Statutory certiorari and common-law certiorari are two different things. *Lakeshore Development Corp. v. Plan Comm.* (1961), 12 Wis. 2d 560, 107 N.W. 2d 590. A basic issue in *Buhler* was whether a court even has jurisdiction to grant review against zoning ordinances when it is alleged that they are unconstitutional, unreasonable or discriminatory; and then what is the limit of the court's review. Most importantly, *Buhler, supra,* recognized that a court's review, a court's judicial interference, and a court's power to substitute its judgment is limited but only "in the absence of statutory authorization." In this case statutory authorization clearly exists.

This court's decisions in *Lakeshore Development Corp. v. Plan Comm., supra,* and *State ex rel. Casper v. Board of Trustees* (1966), 30 Wis. 2d 170, 140 N.W. 2d 301, not only further negate appellants' position but also help to clarify the apparent confusion between common-law ceritorari and statutory certiorari. In *Lakeshore Development Corp.*, this court stated at page 565:

> "The writ of certiorari at common law was limited in scope and a motion to quash, either before or after the return to the writ was made, usually raised only questions of jurisdiction or excess power set forth as errors in the petition although other errors might appear in the return. Ferris, Extraordinary Legal Remedies, p. 204, sec. 178. The return was taken as conclusive if responsive to the petition and could not be impeached by collateral affidavits. After the return was made the court could dismiss or quash the writ or enter a judgment of affirmance.
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> "The scope and purpose of the writ of certiorari has been enlarged by statute and it is now used as a method of appeal to determine not only the jurisdiction of a municipal board or agency but also to review the action of such a board as arbitrary, unreasonable, or discriminatory and sometimes to decide the merits of the action. . . ."

In *State ex rel. Casper, supra,* the court stated at pages 175, 176:

> "We point out again . . . that a review by a writ of certiorari has different characteristics than the common-law writ of certiorari. The latter writ is granted in the discretion of the court, *Consolidated Apparel Co. v. Common Council* (1961), 14 Wis. (2d) 31, 109 N.W. (2d) 486, while the statutory review by certiorari is a matter of right and a proceeding which is much enlarged in scope

> because it inquires into not only the jurisdiction of the board or body making the determination but also the merits of the determination. . . ."

The trial court here did not err by taking additional evidence and basing its findings of fact and conclusions of law, at least in part, upon such evidence.

The trial court concluded as a matter of law that a Browndale home in which not more than five emotionally disturbed children resided, as described in the findings of fact, qualifies as a single family dwelling under the zoning ordinance and requires no site approval. The appellants, the Board of Adjustment and the Town of Cottage Grove, contend this is error.

Respondent first maintains that the trial court's decision should be affirmed since the circuit court's findings of fact are not against the great weight and clear preponderance of the evidence. This position would be sound if only a question of fact was presented to this court on review. In *Boutelle v. Chrislaw* (1967), 34 Wis. 2d 665, 673, 150 N.W. 2d 486, this court stated it is ". . . not bound by a finding of the trial court which is based upon undisputed evidence when that finding is essentially a conclusion of law. . . ." The basic issue here is an interpretation of an ordinance. This is a question of law. True, the evidence conflicts as to whether Browndale therapeutic homes prior to January 1, 1972, were ever treated and licensed by the state as foster homes. But this is only a collateral fact in dispute. It is not controlling as to the issue of whether these therapeutic homes are now single family dwellings within the meaning of the ordinance after the Involvement Center became a licensed child welfare agency. What is also critical

is that much of the conflicting trial testimony went to the issue of interpreting and construing the terminology in the ordinance and the Department of Health and Social Services' rules governing foster homes and child welfare agencies. This conflict in testimony on how to interpret the law does not change the texture of the issue from law to fact. All the material facts that make up the nature and operation of these therapeutic homes are undisputed. Accordingly, an issue of law, not fact, is presented.

The question then is whether these therapeutic homes are single family dwellings within the meaning of the ordinance. To resolve this issue both the appellants and the respondent rely heavily on this court's decision in *Missionaries of La Salette v. Whitefish Bay* (1954), 267 Wis. 609, 66 N.W. 2d 627. In that case certain basic rules of construction were pronounced, to wit, at pages 614, 616, 617, 618:

> "Restrictions contained in zoning ordinance must be strictly construed. A violation of such ordinance occurs only when there is a plain disregard of its limitations imposed by its express words. . . .
>
> ". . .
>
> "It is not within the court's province to add or detract from the clear meaning that the village board has expressed in its own definition of the word 'family.' . . .
>
> ". . .
>
> "The construction of the ordinance under the facts of record is a question of law. [Case cited.]
>
> ". . .
>
> "This court has refused to apply a literal construction of a zoning ordinance in several cases, stating: 'Although the letter of the ordinance is as stated the letter need not necessarily be applied. [Case cited.] "The letter killeth but the spirit giveth life." ' [Case cited.]

"Ordinances, like statutes, are to be construed according to their intent.[Case cited.]"

Although admittedly a close question, we are of the opinion that Browndale therapeutic homes are not single family dwellings. These therapeutic homes are not "occupied exclusively as a residence for one family" under sec. 10.01 (18) (a) of the ordinance. First, Browndale's purpose is commercial. This foreign corporation is in the sole business of buying property with homes located on it for the purpose of leasing such homes for profit to Involvement Centers as care facilities.7/ Respondent argues that such a factor is immaterial, but this argument only attempts to avoid the issue. The commercial aspect is very relevant to the actual use of the homes, especially when Browndale intends to lease six homes on a 182 acre plat site. Six therapeutic care facilities located in one concentrated area are more in truth a colony of homes for the care and treatment of emotionally disturbed children. In fact, such a concentrated group of therapeutic homes would be much the same as one large institutional complex of buildings on property which cared for 30 children. Such a concentration of homes could very well defeat Mr. Brown's philosophy of integrating small groups of children into the community area in order to duplicate family life style. The use of the premises is not even principally for residential living purposes. Rather, its primary use is to provide care and treatment for emotionally disturbed children. A staff is hired expressly for this purpose. The children in these therapeutic homes just do not

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7/ It must be remembered that Browndale admitted this in its petition for review, and it also stated that it was not engaged in the business of caring for emotionally disturbed children.

merely live upon the permises, they are there primarily for rehabilitation and treatment. Duplicating the family life style is only one of the elements of rehabilitation. Other elements such as psychiatric and medical care and strict supervision are also essential ingredients. The therapeutic home "arrangement" is substantially different than a group of priests, nurses, school teachers, students or others who acquire premises to use as a residence for a group. The Board of Adjustment's decision had a substantial basis in fact when it found that the intended meaning of a "single family dwelling" does not include care and treatment homes for emotionally disturbed children. This is especially true when one looks at the fact that six therapeutic homes are planned to be colonized in one site area.

We believe that the use and occupancy of the premises by therapeutic care centers as a single family dwelling not only defeat the zoning ordinance's intent but they also disregard the limitations imposed by the express words of the ordinance — "occupied exclusively as a residence for one family."[8]

If it were not for the extensive staff which manages, directs and controls these children, the homes would cease to exist.

The question then is what classification of "uses" do these homes fall under, and where can the homes be located? As the record points out, the Board of Adjustment classified these therapeutic homes as the "type of use" covered under sec. 10.12 (2) (c) of the ordinance. Sec. 10.12 (2) (c) allows

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[8] Sec. 10.01 (18) (a) of the ordinance.

permitted uses subject to site approval for "extended care facilities," [9] but respondent argues that such homes are not extended care facilities and to interpret therapeutic homes as such thwarts their purpose. Even if these are not extended care facilities, the Board of Adjustment has the statutory power under sec. 59.99 (7) (b), Stats., to grant ". . . special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance." The board also has the power and authority under sec. 59.99 (7) (c) to grant in ". . . specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, . . ." The fact that the board has already allowed one therapeutic home in this disputed district in the town of Cottage Grove evidences this. It cannot be reasonably said that the board is attempting to thwart this method of care and treatment for emotionally disturbed children. The board has expressed no objection to the therapeutic home idea but only justifiably refused to interpret the therapeutic home as a single family dwelling — especially in light of Browndale's commercial attempt to colonize six homes in one site area under the guise of designating them as single family dwellings. It is apparent that Browndale does not want to be forced to obtain site approval for the six therapeutic homes planned to be colonized on the 182 acre area. The minutes of the board meeting indicate that this was one of the major disputes.[10]

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[9] Miss Nina Neupert, a social worker for the Department of Health & Social Services, testified the care was "intensive" and "extensive."

[10] In the Minutes of the board meeting it was also brought out that Mr. Brown not only intended to have six homes on the 182 acre site but also had originally planned to build 20 more units. Supposedly this plan to build 20 more home units was abandoned.

The respondent argues that a therapeutic home is no different than a foster home. In particular, it is maintained that: (1) Therapeutic homes can qualify as foster homes; (2) that there is no substantive difference between the two homes; (3) that the homes provide the same type of services; and (4) both homes are really one and the same. Therefore, it is maintained that therapeutic homes are being denied their Fourteenth Amendment right to equal protection under the law since foster homes are a permitted use as a single family dwelling unit.

The constitutionality of the state's general power to zone property is founded in the public interest. The state's police power may be delegated by it to the cities and counties. Like other regulations under the police power, ". . . a specific zoning ordinance must meet the constitutional demands of due process and the equal protection of the law. . . ." *State ex rel. Wis. Lutheran High School Conference v. Sinar* (1954), 267 Wis. 91, 95, 65 N.W. 2d 43, case dismissed 349 U.S. 913, 75 Sup. Ct. 604, 99 L. Ed. 1248. In *Sinar* the court also stated, at pages 95, 96:

> ". . . It must '. . . provide those in similar circumstances, among whom no reasonable basis for distinction exists, with equal protection of the law, as is constitutionally required of all ordinances as well as statutes.' . . .
>
> ". . .
>
> " '. . . a classification to be valid must always rest on a difference which bears a fair, substantial, natural, reasonable, and just relation to the object, act, or persons in respect to which it is proposed.' . . ."

In *Scharping v. Johnson* (1966), 32 Wis. 2d 383, 396, 145 N.W. 2d 691, the court stated:

" '. . . classifications of persons or property must be based upon reasonable differences or distinctions which distinguish the members of one class from those of another in respects germane to some general and public purpose or object, of the particular legislation.' *Christoph v. Chilton* (1931), 205 Wis. 418, 237 N.W. 134.

"In *Madison Metropolitan Sewerage Dist. v. Committee* (1951), 260 Wis. 229, 253, 50 N.W. (2d) 424, we stated that:

" 'The question of classification is primarily for the legislature, both as to need and basis. . . . All that seems to be required is that there must be some reasonable basis along general lines for the adoption, all reasonable doubts to be resolved in favor thereof. . . .' "

The respondent has made a forceful argument that therapeutic homes appear to be no different than foster homes. These two types of homes have substantial differences that permit separate reasonable classifications. Therapeutic homes are not being denied equal protection of the law under the the zoning ordinance. There are relevant distinctions between foster homes and therapeutic homes. Mr. Brown testified that therapeutic parents and therapeutic homes are not substitutes for the biological parent or home. Foster parents and foster homes are an attempt to be almost a complete substitution. The foster parents' role is "*in loco parentis.*" Children in foster homes are not necessarily delinquent, dependent nor neglected. The foster home's main emphasis is not rehabilitation. In contrast, therapeutic homes described herein accept types of severally emotionally disturbed children for the purpose of rehabilitation. Foster homes are not financial enterprises; the attempt is only to render a service. This cannot be said about Browndale or its affiliated Involvement Center in their ownership and management of therapeutic homes. Therapeutic homes are under the control of the Department of Industry, Labor and Human Relations' building code.

The home facilities must meet fire regulations, plumbing regulations, etc., and such homes are inspected and treated differently than the regular residence or foster home. Foster homes try to duplicate the biological family. Therapeutic homes only try to duplicate the family life style. For instance, the foster child lives and sleeps with the foster parent at the foster home. This is not true for the therapeutic home. The therapeutic parent does not live or sleep there but rather works at such home. If married, both spouses are required to apply for a foster parent license. The foster parent and not the home is licensed. In the therapeutic home the house must be licensed, but the therapeutic parent need not be. The foster parent and foster home remain under the direct control, supervision and responsibility of the H&SS Department. The foster parent must enter into a contractual agreement with the department. Not so for the therapeutic home because as a child welfare agency it is autonomous. The therapeutic home is not under the same type of control at all, nor is the therapeutic parent under a contract with the department. Mr. Brown testified that the therapeutic home concept is not explicitly aimed at avoiding the notion of institutions. The foster home is in no way related to institutionalization. Foster homes cannot have more than four children without the express permission of the department. Therapeutic homes have no numerical limitation as to the number of children it can care for and treat in one home. Secs. 48.60; 48.62; and 48.64 (3), Stats. PW-CY 40.62 (2) (g) talks specifically about foster children sleeping in a "single family dwelling" with the foster parent. Sub. (2) (e) states a foster child cannot sleep in any building.

apartment, or other structure which is separate from the family home. There is no such specific limitation for therapeutic homes. Lastly, from the above differences it can be reasonably said that foster homes constitute a "family" under zoning laws even before any child is placed with the foster parent. As appellants correctly point out, ". . . The residential character of a foster home does NOT depend upon the foster child. . . ." This cannot be said for Browndale therapeutic home facilities.

These enumerated distinctions show beyond reasonable doubt that foster homes have a fair, substantial, natural, reasonable and justifiable classification not in violation of constitutional equal protection. The Board of Adjustment could reasonably conclude, under a rational construction of the zoning ordinance, that the Browndale-type therapeutic homes did not come within the ordinance definition of a family and that several of them within a limited area were inconsistent with the intention and purpose of the zoning ordinance. The board in determining that Browndale homes would not be permitted in the A-1 residential zone without prior site approval acted reasonably and within its jurisdiction.

The respondent contends that since both the appellant and the intervenor-appellant failed to include an adequate abridgement of the trial testimony in their appendices as required by sec. 251.34 (5) (c), Stats., the court should impose double costs, assume that the evidence supports the trial court's findings and affirm the case without opinion. Intervenor-appellant argues that there was adequate compliance with sec. 251.34 (5) (a), (b), (c) and (d), when its appendix and appellant's are read together.

The defendant-appellant, The Board of Adjustment for the County of Dane, only sets forth the memorandum decision, the findings of fact, conclusions of law and judgment in its appendix. The intervenor-appellant, Town of Cottage Grove, in its appendix, provided four pages of abridged testimony from a transcript of testimony in excess of two hundred pages. The respondent did prepare and submit a substantial and helpful abridgement of the testimony.

It is clear that appendices of the appellants do not comply with sec. 251.34 (5) (c), Stats., which require an abridgement of the trial testimony.

The court, although it was inconvenienced by a lack of a proper appendix, was able to determine the facts from the transcript, the respondent's appendix, and the excellent and comprehensive memorandum opinion filed by the trial court. Because of the public importance of these matters the case could not be affirmed without opinion, but because of the failure of the appellants to adequately comply with sec. 251.34 (5) (c), Stats., the court will not allow costs on this appeal. Sec. 251.38 (2).

By the court. — The judgment of the circuit court is reversed and cause remanded with directions to affirm the decision of the Board of Adjustment for Dane County.

MEMORANDUM DECISION OF WISCONSIN CIRCUIT COURT

STATE OF WISCONSIN — DANE COUNTY
CIRCUIT COURT

BROWNDALE INTERNATIONAL, LIMITED, a Canadian corporation,
Petitioner,

Case No. 135-488

vs.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, consisting of MILLARD ERICKSON, OSCAR HOLTE, and HARLAND DAHLK,
Respondent,

and

TOWN OF COTTAGE GROVE
Intervener.

BEFORE HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is an action in certiorari to review the decision of the respondent Board of Adjustment (hereafter the "Board") rendered March 17, 1972, interpreting portions of the Dane County Zoning Ordinance. By order dated April 28, 1972, the Court denied the respondent Board's motion to quash or supersede the writ of certiorari. In the Court's memorandum decision rendered with respect to the motion to quash or supersede, the Court set the hearing on the merits for May 4, 1972, and therein stated that pursuant to Sec. 59.99 (13), Stats., the Court would hear such relevant and competent evidence as the parties desired to present at the hearing. The

hearing commenced as so scheduled on May 4th and the taking of testimony extended throughout that day and into the morning of May 5th.

The controversy sought to be resolved in this litigation is what provisions of the Dane County Zoning Ordinance (hereafter "ordinance") are applicable to the "Browndale" type of therapeutic family home for emotionally disturbed children, (hereafter "Browndale home(s)"), as exemplified by the six of such homes now being operated in Dane County by Involvement Centers, Wisconsin, Inc., (hereafter "Involvement Centers") lessee of petitioner Browndale International, Limited (hereafter the "petitioner corporation").

The decision of the Board of March 17, 1972, essentially was: (1) these Browndale homes do not qualify as a "single family dwelling" as that term is defined by Sec. 10.01 (18) and (19) of the ordinance; (2) such homes are of a type of use that falls within the category of institutions listed in Sec. 10.12 (c) of the ordinance and, therefore, require site approval; and (3) the petitioner corporation was ordered to desist from operating such homes in the Town of Cottage Grove until site approval had been obtained from the Dane County Zoning Committee. The correctness of this interpretation of the ordinance is what is being challenged in this action.

STATEMENT OF FACTS

The president of petitioner corporation is John Brown. Brown is a psychiatric social worker by profession. His education in this field consisted of two years of work at the University of Minnesota followed by two years at the University

of British Columbia where he received his B.A. degree in social work. He then took work in advanced social (work) administration at the University of Chicago and received an M.A. degree from that university in arts and social (work) administration. He has worked with socially disturbed children since 1944.

For some years he was employed at Warrendale, an institution in Ontario, which, when he went there, was operating a congregate type of institution for emotionally disturbed children. Over the years Warrendale changed over to a family model treatment center. In 1966 Brown started the privately operated Browndale program, commencing in Ontario and then branching out into the United States. There are now fifty Browndale homes being operated in the United States and Canada.

The guiding principle of the Browndale home is to duplicate as nearly as possible what a child living in such a home would get if living with his own family. It has been found that the emotionally disturbed child needs an intimate tie to someone else. In a Browndale home this need is sought to be met through the small group of children he is associated with in the home living together as a family. The children in these homes are of different ages and sex as this makes for a more harmonious relationship. Each home is staffed with "therapeutic parents", a man and a woman, preferably in their twenties, who have a sense of maturity and concern for children. Meals are prepared and served as they would be in any private family.

In the six Dane County Browndale homes the largest number of children housed in one home is eight and the

smallest is four, being the one operated in the Town of Cottage Grove. The "model" number is five. In addition to the therapeutic parents each home is staffed by an employee who does the cooking and housework and a lady who comes in and stays with the children at night. No staff member sleeps on the premises, only the children. In addition Involvement Centers has nurses and social workers in its employ who visit the homes and has contracted with a psychiatrist and a pediatrician to supply service as needed for an hourly charge.

Each Browndale home is housed in a private dwelling the exterior of which is no different than other private homes in the neighborhood. No signs are erected on the premises or affixed to the home to indicate that is it a home for emotionally disturbed children.

All children in the Browndale homes in Dane County are placed there as a result of juvenile court proceedings. Their maintenance of $37 per day is either paid by the State or by some county. The present six homes in Dane County are inadequate to meet the referrals from the State and there is a present waiting list of 19 children. It is projected that the operation in Dane County will have 100 to 105 children by the end of 1972.

The average period a child stays in a Browndale home is two years and 90 per cent of those discharged are rehabilitated so as to be able to return to their families or make their way in life. This is a much higher percentage than has been achieved by child welfare institutions operated on an institutional basis. No child is kept in a Browndale home against his will and he is transferred elsewhere when he expresses a desire to leave.

The Court was much impressed by the testimony of Miss Nina Neupert, a social worker employed by the Division of Family Services, Wisconsin Department of Health and Social Services. (When "department" is hereinafter used it generally refers to the Division of Family Services, of the Department of Health and Social Services.)

Miss Neupert is familiar with the operation of the Browndale homes by Involvement Centers in Dane County as she has visited four of them. Furthermore, she went to Ontario and worked three days in a Browndale home as a social worker. She termed the Browndale home a "very dramatic departure" from the traditional child welfare institution. She would not classify a Dane County Browndale home as an "institution" for many reasons. Among these reasons is that there is no lump care of children in one building or unit, and no serving food in the institutional manner. Some Wisconsin "child welfare institutions" have private cottages in which the children sleep but are operated on an institutional and not a family basis. Furthermore, the care provided the children in a Browndale home is much more than supervision. No child that the department through her has placed in such a home has ever run away.

Of the six Browndale homes operated in Dane County three are in the City of Madison; one in the Town of Fitchburg near Verona; and one in the Town of Christiana near Cambridge; and one in a leased dwelling in the Town of Cottage Grove. The first of these was established in September., 1971. Up until January 1, 1972, the department licensed them as "foster homes," under Sec. 48.62, Stats., the licenses, however, not being issued to petitioner corporation (Involvement Centers not yet having been incorporated),

but to the therapeutic parents of each home. The department then determined that these homes should not be licensed as foster homes but that the corporation operating them should be licensed as a "child welfare agency" under Sec. 48.60, Stats. John Vick, agency licensing supervisor, explained in his testimony the reason for this change in licensing. It was necessitated in his opinion because some Browndale homes had more than four children housed in them and he had concluded that, inasmuch as more than one agency placed children in the homes, no exception to have more than four so housed could be granted.

The Court deems that Vick was correct in this conclusion. Sec. 48.64 (3), Stats., provides that not more than four children may be placed in a foster home unless all are in the relationship to each other of brother or sister or unless the department in accordance with its rules makes an exception. Rule PW-CY 40.64 (3) (a) of its Rules for Licensing Foster Homes provides, as a requirement for granting an exception to the four unrelated children maximum, that the foster parents shall contract in writing for the exclusive placement of children in their home by or through one agency. PW-CY 40.64 further provides that in no instance will the department make an exception for more than eight unrelated children in one foster home.

Vick further testified that under the statutes (Sec. 48.67 (1)) the department is authorized to license only three categories of child welfare facilities: (1) foster homes; (2) child welfare agencies; and, (3) day care centers. Having ruled out the applicability of the foster home classification, the only other category which possibly would fit is child welfare agency. Without a license, the Browndale homes could not

operate because Sec. 48.60, Stats., prohibits any person from providing care and maintenance for 75 days in any twelve month period for four or more children without a license. PW-CY-40.51 (1) requires every child welfare agency to be incorporated. No distinction is made between corporations for profit, such as Involvement Centers, or charitable or religious corporations. The department's Rules for Licensing Child Welfare Institutions, PW-CY-40.50 (e) 7, defines a "child welfare institution" as "a child welfare agency which regularly provides care and maintenance for children within the confines of its building". Thus each Browndale home operated by Involvement Centers is a child welfare institution.

On January 28, 1972, the department issued a provisional license to Involvement Centers which had been incorporated late in December, 1971, as a child welfare agency, to operate the five Browndale homes it was then operating in Dane County. (See Exhibit 1.) Later the home at Cottage Grove was leased and the license was amended to include that. The license specified the maximum capacity of each home. None specified a capacity in excess of eight and one of the Madison homes had a specified maximum capacity of five. This maximum capacity was based upon the maximum child sleeping facilities each home provided.

On December 8, 1971, Peter J. Miller, owner, accepted petitioner corporation's written offer to purchase an 80-acre farm in the Town of Cottage Grove having three one family residences upon it (Ex. 8). Thereafter, on January 22, 1972, Lloyd W. Moe, owner, accepted petitioner's written offer to purchase three parcels of land, each having on it a private family dwelling house, in the Town of Cottage Grove. (Ex. 7).

Each offer to purchase contained certain conditions upon which the offer was conditioned. Two of those conditions are here material:

> "Licensing for purchaser's special use by the Wisconsin Department of Welfare" . . . "approval from municipality, county or state, whichever governmental agency has jurisdiction for purchaser's special use of this property under proper zoning."

The "special use" referred to in the last stated condition is the operation of Browndale homes by Involvement Centers, lessee of petitioner corporation.

One of the homes covered by the offer to purchase to Moe had been leased to petitioner's corporation and the Browndale home operated in the Town of Cottage Grove is operated in that home. It is petitioner corporation's intention to lease the other five homes covered by these offers to purchase to Involvement Centers for the same purpose if the licensing and zoning hurdles mentioned in the above quoted two conditions are surmounted.

The ordinance classifies Dane County into these use districts: R-1, R-2, R-3, and R-4 Residence Districts; B-1 Local Business District; RH-1 Rural Homes District; A-1 Agricultural Districts; C-1 Commercial and Light Manufacturing Districts; C-2 Commercial and Light Manufacturing Districts; M-1 Industrial Districts; CO-1 Conservancy Districts; and Re-1 Recreational Districts. The six homes which petitioner has contracted to purchase in the Town of Cottage Grove are located in an A-1 Agricultural District. The ordinance specifies permitted uses in each use district. Sec. 10.16 (1) (a) provides, "Except as otherwise expressly provided, any use listed as a permitted use in any district shall be construed as a prohibited use in a more restricted district."

Sometime in January, 1972, Attorney Glesner, representing petitioner corporation and Involvement Centers, consulted with Lavern J. Enger, Zoning Supervisor, regarding what, if anything, had to be done under the ordinance in order to operate Browndale homes in the five other homes under contract of purchase in the Town of Cottage Grove. Enger ruled that inasmuch as foster homes had been permitted under the single family dwelling use in residential districts, and Browndale homes had previously been licensed to operate as foster homes by the department, it made no difference that these homes were now licensed as a child welfare agency or institution because neither foster homes nor child welfare institutions were specifically covered by the ordinance. Therefore, it was Enger's interpretation that no affirmative steps had to be taken under the ordinance in order for the five proposed Browndale homes to be operated in the A-1 Agricultural District in the Town of Cottage Grove.

The Town of Cottage Grove officials and one Graffin learned of this interpretation by Enger and appealed therefrom to the Dane County Board of Adjustment, the notice of appeal being dated February 9, 1972. A public hearing was held before the Board on March 10, 1972, at which the town was represented by Attorney Lloyd Schneider and petitioner corporation was represented by Attorney Glesner. At this hearing Enger's interpretation appealed from was presented in writing dated March 10, 1972, signed by him, and constitutes Document No. 4 attached to the Board's filed return to the writ of certiorari. The essential gist of the Board's decision on this appeal has heretofore been set forth herein.

One further development should be noted although the Court does not deem it has any material bearing on the legal issues confronting it in this action. Some citizens of the Town of Cottage Grove, including State Representative Everson, protested over the phone to the department about locating more Browndale homes in the town. On March 23, 1972, as a result of such protest, Vick, Edward Buehler, Regional Director of the Family Services Division, and two other officials of the department met on the evening of March 23, 1972, at the Firehouse in Cottage Grove with 25 to 35 town citizens. Those who spoke voiced opposition to additional Browndale homes being located in the town, except that some stated they didn't object to one additional home being located there.

After this meeting of March 23rd Buehler, Vick and two other Department representatives held a meeting with Brown and two of his associates on April 18, 1972, and informed them of their decision to license no more facilities in the Town of Cottage Grove between then and January 1, 1973, when the question would be reassessed because of the protests voiced at the March 23rd meeting. After discussion, this decision was modified to allow for a reassessment before January 1, 1973, if the department had reason to believe the community's receptivity to additional children had changed. The basis for this decision were provisions in the Rules for Licensing Child Welfare Institutions, PW-CY 40.51 (1) (a) and PW-CY 40.53 (2) which stressed the protection of the safety and welfare of the children, it being thought that living in a hostile community was not in the best interests of the children. This decision and the reason therefor were set forth in a letter from Buehler to Brown dated April 21, 1972 (Ex. 3).

ISSUES PRESENTED

The Court and counsel agreed at the conclusion of the hearing of evidence on May 5th that there are three issues presented, they being:

(1) Do the Browndale homes qualify as single family dwellings under the ordinance?

(2) If they do not so qualify, was the decision of the Board correct that these homes are of the same category as the institutions named in Sec. 10.12 (2) (c) of the ordinance so as to require site approval before they can be located in a Residential R-4 or an Agricultural A-1 district?

(3) If the Browndale homes are not permitted use under the ordinance in any residential or agricultural use district, are they excluded altogether, or are they permitted under some permitted use of similar category?

Upon further reflection the Court has concluded that the third enumerated issue is not to be resolved in isolation after resolving the first two issues because the resolution of this issue may well play a part in resolving one or both of the other issues.

BROWNDALE HOMES AS SINGLE FAMILY DWELLINGS

Single family dwellings are a permitted use under the ordinance in all four residential districts, and also in the

agricultural district (A-1) without necessity of obtaining site approval. A single family dwelling is defined by Sec. 10.01 (19) as:

> "A building designed for and occupied exclusively as a residence for one family."

A family is defined by Sec. 10.01 (19) as:

> "Any number of individuals related by blood or marriage, or not to exceed five (5) persons not so related, living together on the premises as a single housekeeping unit, including any domestic servants."

A Browndale home, as exemplified by the six now operating in Dane County, which operates with no more than five children housed therein has no more than five unrelated persons "living together" if the therapeutic parents and other employees of Involvement Centers servicing that unit are excluded. No employee of Involvement Centers, including the therapeutic parents, sleep at one of these homes.

Does "living together" require that one sleep at least part of the time on the same premises with certain persons in order to be considered to be living with them? The Court could find no help in resolving that question from the dictionary definition of "living" or from the cases cited in 25A Words and Phrases under the term "Living Together". The latter cases mostly deal with husband and wife, or parent and child, and none deals with the situation where people associate and eat together in the daytime and then sleep in their separate places of abode. The Court has also checked Anderson, American Law of Zoning (1968) Sec. 8.27 et seq., dealing with single-family districts, and found nothing in the text or cited cases which deals with a situation

where a person eats and spends the day with others in one place and returns to his place of residence to sleep at night.

The Court believes that for the purposes of zoning statutes and ordinances the term "living together" can apply to but one location, not two. In a situation like we have here with the therapeutic parents and domestic employees residing and sleeping off the premises, undoubtedly in some cases with members of their own family, the place where they live with others is where they sleep and have their permanent home. Thus the Court determines that the therapeutic parents and other employees of Involvement Centers who render service in the Browndale homes operated in Dane County are to be excluded in determining whether five or more unrelated persons are living together in the sense of that term as used in Sec. 10.01 (19) of the ordinance.

Are there other factors which prevent a Browndale home having no more than five emotionally disturbed children from qualifying as a single family dwelling under the ordinance? Three factors have been urged by counsel for the Board and the intervener town as preventing these Browndale homes from so qualifying: (1) the licensing of them as child welfare institutions; (2) the fact that some are licensed for a maximum of as many as eight children; and (3) the children are involuntary residents of such homes.

An aspect of the effect of licensing as a child welfare institution is that the homes are subject to inspection by the Division of Industrial Safety and Buildings to see that they comply with the State building code and requirements established through such inspections (PW-CY 40.53 (1) (a) and (c)), while ordinary private residences and foster homes are not subject to such inspection. There is no requirement in the department's Rules for Licensing Foster Homes that

the foster parents sleep on the premises where the children live with whose custody they have been entrusted. Miss Neupert testified to this and the Court has verified this by inspection of such rules. She further testified that the four Browndale homes in Dane County which she visited would each qualify as a foster home. In fact up until January 1, 1972, they were so licensed as foster homes, and the reason for changing the license to a child welfare agency had nothing to do with building code compliance or inspections. The Court determines that the fact that the requirements of PW-CY 40.53 (1) and (a) apply to Browndale homes licensed as child welfare institutions and not to private residences or foster homes does not place Browndale homes without the definition of single family dwellings of the ordinance.

While dealing with this matter of licensing as a child welfare institution it must be kept in mind that the nature of the operation of the Browndale homes in Dane County did not change one iota from what it was when they were licensed as foster homes with respect to any aspect which would affect zoning. As Miss Neupert testified, their operation does not have the characteristics of what one ordinarily associates with institutional care of children. Furthermore, it is conceded that foster homes, in which not more than five unrelated persons reside, qualify as single family dwellings under the ordinance. It would clearly be a denial of equal protection of the laws under the Fourteenth Amendment to so interpret and administer the ordinance as to permit foster homes having no more than five unrelated persons residing therein in residential and agricultural districts without the necessity of site approval, and require site approval for a Browndale home having no more than five unrelated children and no adults residing therein.

The Court now turns to the situation with respect to those Browndale homes in the county whose maximum capacity as stated in Involvement Center's license is more than five children but have no more than five children living therein. (None are licensed with a greater maximum capacity than eight children.) The Court determines that this feature of the license does not prevent such a Browndale home from qualifying as a single family dwelling under the ordinance. Should Involvement Centers violate the ordinance by having more than five children in the home, except on a very short temporary basis, if located in an R-1, R-2, or R-3 residence district, or RH-1 Rural Homes District, it would be subject to the penalties, including injunctional restraint, provided in Sec. 10.25 (6) of the ordinance. If located in an R-4 or A-1 Agricultural District, it would be a violation unless site approval was first obtained.

Lastly, the Court considers the argument that the children in a Browndale home are involuntarily detained there. They are no more involuntarily detained than are children in a foster home. Furthermore, the testimony of Brown is uncontradicted that, if children desire to leave, their wishes are respected and the placement authority is requested to place them elsewhere. The Court holds that the factor of the nature of the custody, being no different than that in foster homes, does not prevent Browndale homes from qualifying as single family dwellings under the ordinance so long as no more than five unrelated people live together therein.

It is the Court's ultimate conclusion that the Board's interpretation of the ordinance that Browndale homes, regardless of the number of unrelated persons living together therein, cannot qualify as single family dwellings of the ordinance, cannot be sustained on any rational basis.

BROWNDALE HOMES REQUIRING SITE APPROVAL

Nowhere in the ordinance is there a permitted use specified in the four residence districts and the RH-1 rural home districts which covers the operation of a Browndale home in which in excess of five, but not more than eight, children reside.

Counsel for the intervener has urged that "extended care facilities" of Secs. 10.08 (1) (d) and 10.12 (2) (d) cover such homes. The first of these two provisions grants permitted use status of R-4 residence districts to "nursing homes, convalescent homes or extended care facilities", provided site approval is obtained. The second specifies that "hospitals, nursing homes, convalescent homes, extended care facilities, sanitariums and orphanges" are a permitted use in A-1 Agricultural Districts, provided site approval is first obtained.

Counsel bases his argument on separate dictionary definitions of the words extended, care, and facilities. The definition which has led counsel astray is his selecting from among the several synonymous adjectives of "extended" that which equates extended with "intensive or extensive". The more appropriate synonymous dictionary adjective is "prolonged". Extended care facilities have a common accepted meaning of providing care for a period beyond that provided by some other facility such as a hospital. Under the Medicare feature of the Social Security Act extended care facilities are facilities for caring for people after leaving a hospital who are not sufficiently recovered to return to their own homes. The Court determines that a Browndale home is not an "extended care facility" within the meaning of the ordinance.

The welfare of emotionally disturbed children living in Browndale homes requires that such homes be located where other private families reside, and not be confined to a district zoned as a commercial or industrial district. A zoning ordinance which does not permit such houses to be located in any district where families usually reside would in the Court's opinion be unconstitutional. A State interest is involved because the Division of Family Services places children in these homes, and a zoning ordinance which excludes them from all residential districts would be unconstitutional. **Abbott House v. Terrytown** (1970), 34 App. Div. 2d 281, 312 NYS 2d 841.

It is the duty of a court in construing a statute or ordinance to so construe it not only in such a manner as to avoid a construction that will render it unconstitutional, but also so as to avoid grave doubts on its constitutionality as construed. **Swanke v. Oneida County** (1953), 265 Wis. 92, 99, 60 N.W. 2d 756, 62 N.W. 2d 8. The Court deems that in accordance with this principle search should be made for the most nearly analogous use permitted under the ordinance in a residential use district. The Court deems that nursing homes, convalescent homes, or, extended care facilities permitted in any residential district. However, Sec. 10.12 (2) (d) of the ordinance permitting such use does so on the condition that site approval is obtained from the County Zoning Committee. The Court determines that such a requirement is a valid and constitutional one.

Thus it is the Court's conclusion that Browndale home in the county in which more than five, but not in excess of eight, children reside is a permitted use in either R-4 residential and A-1 Agricultural Districts provided site approval is first obtained as provided in the ordinance.

CONCLUSION

Findings of Fact, Conclusions of Law, and Judgment will be made and entered consistent with this decision.

Dated this 15th day of May, 1972.

George R. Currie
Reserve Circuit Judge

STATE OF WISCONSIN DANE COUNTY
CIRCUIT COURT

BROWNDALE INTERNATIONAL, LIMITED, a Canadian corporation,
Petitioner, Case No. 135-488

vs.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, consisting of MILLARD ERICKSON, OSCAR HOLTE, and HARLAND DAHLK,
Respondent, FINDINGS OF FACT AND CONCLUSIONS OF LAW

and

TOWN OF COTTAGE GROVE,
Intervener.

BEFORE HON. GEORGE R. CURRIE, RESERVE CIRCUIT JUDGE.

The above-captioned certiorari action having come on for trial before the Court, George R. Currie, Reserve Circuit Judge, presiding, on the 4th and 5th days of May, 1972; and the petitioner having appeared by Attorney Richard C. Glesner and Robert D. Martin of the law firm of Ross,

Stevens, Pick & Ross; and the respondent Board having appeared by Attorney A. Roy Anderson of the law firm of LaFollette, Sinykin, Anderson & Abrahamson; and the intervener having appeared by Attorney Lloyd A. Schneider; and after hearing the proofs of the parties and the Court having filed its Memorandum Decision, I, the judge before whom the action was tried, make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. A Browndale home is a home for emotionally disturbed children wherein the children are housed in a single family type of dwelling and are cared for in a manner closely resembling that of a family as distinguished from an institutional type of care, all as more particularly described in the Court's memorandum opinion.

2. Prior to January 1, 1972, petitioner corporation operated five Browndale homes in Dane County which were licensed as foster homes by the Division of Family Services (hereafter the "Division") of the Wisconsin Department of Health and Social Services (hereafter the "Department"), the licenses being issued to the "therapeutic parents" in each home who were employees of petitioner.

3. About January 1, 1972, all of these homes were leased by petitioner to Involvement Centers, Wisconsin, Inc., (hereafter "Involvement Centers") a newly incorporated Wisconsin corporation, which continued to operate these homes in the same manner as petitioner had operated them.

4. On or about January 28, 1972, the Division concluded that these homes should no longer be licensed as foster homes but a license should be issued to Involvement Centers as a child welfare agency. Such a license was then issued

to Involvement Centers, which license described each home and set a maximum number of children which could occupy each house, in no case exceeding eight children. Under the rules of the Department each Browndale home, as a result of licensing Involvement Centers as a child welfare agency, became a child welfare institution. The change in licensing did not change the method of operating the Browndale homes and they continued to be operated the same as when licensed as foster homes.

5. Early in 1972 a sixth Browndale home was instituted in the Town of Cottage Grove in Dane County in a leased dwelling house and Involvement Centers' child welfare agency license was amended to cover this Browndale home.

6. The number of emotionally disturbed children living in each Browndale home in Dane County varies from a minimum of four to a maximum of eight.

7. Neither the therapeutic parents nor any other employee of petitioner or Involvement Centers sleeps at any Browndale home but such sleeping is done at their usual place of abode elsewhere; however, there is an employee of Involvement Centers who comes in and stays with the children at night.

8. In December and January, 1972, petitioner contracted to purchase six dwelling houses in the Town of Cottage Grove for the purpose of operating Browndale homes therein, one of which homes being the one in which the present Browndale home in that town is being operated. These contracts were conditioned upon licensing being secured from the department and approval being secured from the

proper zoning authority for use of the purchased property for the petitioner's special purpose (meaning the operating of Browndale homes).

9. Petitioner sought and secured from Lavern J. Enger, Zoning Supervisor, a position created by the Dane County Zoning Ordinance, (hereafter "the ordinance"), an interpretation of the ordinance with respect to whether a site approval from the Dane County Zoning Committee as a condition precedent to the operation of Browndale homes in the additional houses contracted to be purchased, all of which are located in an A-1 agricultural district, was required. Zoning Supervisor Enger ruled that no site approval was required.

10. The Town of Cottage Grove and an individual resident of the town appealed from this interpretation by Enger to the respondent Board of Adjustment. A public hearing was held on the appeal and on March 17, 1972, the respondent Board issued its decision which essentially was that Browndale's homes do not qualify as a "single family dwelling" as that term is defined in Sec. 10.01 (18) and (19) of the ordinance; that such homes are a type of use that falls within the category of institutions listed in Sec. 10.12 (2) (c) of the ordinance, and, therefore required site approval; and the petitioner was ordered to desist from operating Browndale homes in the town until site approval had been obtained from the Dane County Zoning Committee.

11. Thereafter, petitioner instituted this certiorari action to review the respondent Board's decision of March 17, 1972.

CONCLUSIONS OF LAW

1. A Browndale home in which not more than five emotionally disturbed children reside, and that is operated as described in the foregoing findings of fact, qualifies as a single family dwelling under the ordinance and requires no site approval under the ordinance in order to operate in Dane County.

2. A Browndale home in which more than five emotionally disturbed children are to reside, except on a very short temporary basis, does not qualify as a permitted use in R-1, R-2, and R-3 residence districts; but constitutes a permitted use in R-4 residence districts and A-1 agricultural districts only on condition site approval is granted by the Dane County Zoning Committee.

3. The decision of the respondent Board of March 17, 1972, is an incorrect, and therefore illegal, interpretation of the ordinance in those respects wherein its interpretation is inconsistent with Conclusions of Law 1 and 2.

Let judgment be entered reversing the decision of the respondent Board dated March 17, 1972, and adjudicating the interpretation of the ordinance set forth in Conclusions of Law 1 and 2.

Dated this 15th day of May, 1972.

George R. Currie
Reserve Circuit Judge

DECISION OF THE DANE COUNTY BOARD OF ADJUSTMENTS REGARDING APPEAL OF THE TOWN OF COTTAGE GROVE AND OLGER GRAFFIN FROM A RULING OF THE DANE COUNTY BOARD OF SUPERVISORS

STATEMENT OF FACTS:

Browndale International, Limited, is a corporation engaged in caring for emotionally disturbed children by trained staff, said children being housed in single family residences.

Browndale International, Limited, is licensed by the State of Wisconsin as a Child Welfare Agency.

Browndale International, Limited, purchased certain single family residences in the Town of Cottage Grove for the purpose of housing and caring for emotionally disturbed children.

The Dane County Zoning Ordinance provides that "not to exceed five unrelated persons may live together as a single family unit in a single family residence."

In the operation of homes by Browndale, the emotionally disturbed children live in the home and there is a staff on duty 24 hours a day who do not sleep on the premises. The Dane County Zoning Supervisor interpreted this operation to be a single family unit in that only two unrelated persons were living there and that this was permitted under the provisions of the Dane County Zoning Ordinance. The Town of Cottage Grove and Olger Graffin on the 9th day of February, 1972, filed an Appeal with the Dane County Board of Adjustments regarding the zoning Supervisor's interpretation of a

single family dwelling. The proper notices of a Public Hearing were published and a Public Hearing was held on March 10, 1972. Browndale International, Limited, was represented by Attorney Richard Glesner and the appellants were represented by Attorney Lloyd Schneider.

After a Public Hearing duly held, the Board of Adjustments makes the following findings:

1. That Browndale International, Limited, is a licensed Child Welfare Agency of the State of Wisconsin and that any homes operated by it for emotionally disturbed children must meet requirements of the State Industrial Commission which single family dwellings do not.

2. That the Board finds that it was not the intent of the definition of a single family dwelling to include treatment of unrelated emotionally disturbed children by unrelated persons.

3. The Board finds that the State of Wisconsin requires that the persons staffing the homes must have certain qualifications which will enable them to provide treatment for the problems of the emotionally disturbed children.

4. The Board further finds that the type of use covered by this Appeal falls within the category of definitions listed under Section 10.12 (2) (c) of the Dane County Zoning Ordinance and, therefore, requires site approval for such use.

THEREFORE, the interpretation of the Dane County Zoning Supervisor of the definition of a single family dwelling and a single family unit is modified to the extent that the Board finds that the use intended by Browndale International, Limited, requires site approval under Section

10.12 (2) (c) of the Dane County Zoning Ordinance and that it is not a single family dwelling or a single family unit within the meaning of the Dane County Zoning Ordinance.

THEREFORE, the Board of Adjustments hereby orders Browndale International, Limited, to cease and desist from operating a Child Welfare Agency for the treatment of emotionally disturbed children in the Town of Cottage Grove until such time as site approval has been obtained from the Dane County Zoning Committee pursuant to the Dane County Zoning Ordinance.

Dated this 17th day of March, 1972.

DANE COUNTY BOARD
OF ADJUSTMENTS

By: _____
Millard Erickson, Chm.

_____
Oscar Holte

_____
Harland F. Dahlk